IN THE COOK ISLAND COURT OF APPEAL
HELD AT AUCKLAND, NEW ZEALAND

CA 9/85
OA No 2/83
PC 1/88

IN THE MATTER of Article 59(1) and (2) of the Cook Islands Constitution as amended by Constitution Amendment (No. 9) 1980-81

AND

IN THE MATTER of an application to the Court of Appeal for leave to appeal to Her Majesty the Queen in Council from a judgment of the Court of Appeal delivered at Rarotonga on the 26th day of July 1988 and numbered Appeal No. 2/83

BETWEEN The descendants of **METUA MOEAU**, Landowners

Appellants

AND **NGAMETUA** and **TAIMAU** being persons named by the Land Court as owners in **TE ARAKURA SECTION 83a, ARORANGI**

Respondent

Hearing: 9 December 2002

Coram: Casey JA (Presiding)
Barker JA
Smellie JA

Counsel: J A Farmer QC and T P Browne for Appellant
R E Harrison QC and M C Mitchell for Respondent

Judgment: 18. 12. 2002

JUDGMENT OF THE COURT

Solicitors:
Browne Gibson Harvey, Avarua for Appellants
M C Mitchell, Avarua for Respondents

[1] On 14 August 2001, Metua Moeau filed an application for the leave of this Court to appeal to Her Majesty in Council from a judgment of this Court delivered in favour of the Respondent, as long ago as 26 July 1988. After the application had been filed, Metua Moeau died and a succession order in respect of her land was made in favour of her descendants. It was in that capacity that the present Appellants filed an amended application for leave to appeal on 4 November 2002.

[2] The present application arises out of an unusual situation. In a reserved judgment delivered on 1 March 1989, this Court, (McCarthy, Roper and Quilliam, JJA) granted conditional leave to Metua Moeau to appeal to Her Majesty in Council. An order granting final leave was made, by consent, on 31 January 1991.

[3] On 9 June 1993, before a fixture had been sought in the Privy Council, the Cook Islands Legislature enacted the Privy Council (Judicial Committee) Amendment Act 1993 ('the 1992-3 Act'). Section 7 of that Act purported to abolish appeals to the Privy Council from decisions of the Court of Appeal in certain cases regarding land ownership and the right to chiefly office in these words:

> "**Limitation of Appeals** – Notwithstanding any royal prerogative, or anything contained in the Judicial Committee Act 1844 of the United Kingdom Parliament, or any Orders made pursuant thereto, no appeal shall lie to Her Majesty in Council from a decision of the Court of Appeal relating to –
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> (a) the right of any person to hold any chiefly office;
>
> (b) the ownership of –
>
> (i) any land which, or any undivided share in which, is owned by a Cook Islander or a descendant of a Cook Islander for a beneficial estate in fee simple whether legal or equitable, including any such land the fee simple of which is vested in a corporation formed pursuant to the Land (Facilitation of Dealings) Act 1970; or
>
> (ii) any Ariki land or Customary land as those terms are defined or used in the Cook Islands Act 1915;
>
> whether or not any such appeal is pending on the date of coming into force of this Act."

[4] On 1 December 2000, the Cook Island Legislature, by the Privy Council (Judicial Committee) Amendment Repeal Act 2000, simply repealed the whole of the 1992-3 Act but without any reference to cases which had been pending at the time of the 1992-3 Act.

[5] Counsel for the Appellant explained that the present application to the Court had been filed in the event that the correct legal position turned out to be that the final leave given by this Court in 1991 had become ineffective as a result of the 1992-3 legislation. Counsel, in that event relied upon Article 59(2) of the Cook Islands Constitution which provides:

> "There shall be a right of appeal to Her Majesty the Queen in Council, with the leave of the Court of Appeal, or, if such leave is refused, with the leave of Her Majesty the Queen in Council, from judgments of the Court of Appeal in such cases and subject to such conditions as are prescribed by Act."

[6] In the event that a further application for leave to appeal be necessary, then counsel submitted that leave should be granted because the appeal concerns interests in land worth in excess of $5000NZ and involves a matter of public and general importance – ie the interpretation and effect of certain orders made by the Native Land Court of the Cook Islands in 1942 and 1944.

[7] Counsel for the Appellants sought an adjournment of the present application to enable the Appellants to commence proceedings in the High Court to have that Court declare the 1992-3 Act unconstitutional on the grounds that it purported to abolish a right enshrined in the Constitution ie the right of appeal to the Privy Council conferred by Article 59(2). A further constitutional challenge would be made on the ground that the 1992-3 Act was retrospective in its operation because it purported to stop the then pending appeal by Metua Moeau who had been given final leave to appeal to the Privy Council.

[8] Counsel for the Respondent opposed the adjournment application. He pointed out that Article 59(2) gave the right of appeal to Her Majesty in Council from judgments of the Court of Appeal only "in such cases and subject to such conditions as are prescribed by Act." He submitted the 1992-3 Act was

constitutional in that it restricted the right of appeal in certain types of case and that it was the very sort of legislation that Article 59(2) of the Constitution envisaged. Counsel had a number of other submissions as to the merits of the present application, including one that the Court was **functus officio**, having already granted final leave in 1991. It is unnecessary to consider these submissions at the present juncture.

[9] We see some merit in the submissions that the 1992-3 Act came within the limits envisaged by Article 59(2). However, we are troubled by the constitutionality of the retrospective nature of the statute. We accordingly consider that the Appellants should have an adjournment in order to test the constitutional argument in the High Court which is the proper first-instance venue for such challenges. The adjournment should be on strict terms.

[10] The Respondent is entitled to costs of this application. Counsel had been prepared to deal with it on the merits before being advised of the adjournment application.

[11] The present application is adjourned **sine die** on the following terms:

[a] The Appellants are to pay the Respondent costs of $1500 plus disbursements as fixed by the Registrar by 14 February 2003.

[b] The Appellants are to bring their declaratory proceedings in the High Court by 14 February 2003.

[c] The Appellants are to prosecute those proceedings with all due diligence.

[d] If any of these conditions is not complied with, the Respondent may apply for the present application to be brought on for hearing.

[e] Liberty to apply reserved.

Casey JA

Barker JA

Smellie JA